O.A 11-2-94

IN THE
SUPREME COURT OF FLORIDA

NO. 83,244

WILLIAM W. SETON, JR. et ux,

Petitioners,

v.

EULA M. SWANN,

Respondent.

Petition to Review a Decision
of the Fifth District Court of Appeal

BRIEF OF AMICUS CURIAE DENIS HECTOR AND JOANNA LOMBARD IN SUPPORT OF RESPONDENT SWANN

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INTEREST OF THE AMICUS CURIAE

As set forth in the accompanying Motion to file Amicus Curiae Brief filed by Denis Hector and Joanna Lombard (the "Hectors"), the Hectors are Florida residents who own a home in a platted subdivision in Dade County. They are presently involved in a boundary dispute with their neighbors in which the correct interpretation of Florida Statute section 95.16 is at issue as it is in this petition. Consequently, the Hectors have a great interest in the interpretation of section 95.16 here. Moreover, in this petition, this Court is asked to interpret the provisions of section 95.16 of the Florida Statutes as amended in 1987 (amendment effective January 1, 1988). The statute that existed prior to the amendment in 1987 is very similar to the statute as amended, with the exception of one provision and indeed it is the effect of that amendment that forms part of the dispute between the parties to this petition. In the Hectors' dispute, an issue may exist regarding which version of section 95.16, the pre- or post-1987-amendment versions, will control in resolving the issues between the Hectors and their neighbors. Therefore, the Hectors have a strong interest in having this Court interpret the current section 95.16 in a manner that will explain how both the pre-1987-amendment version of section 95.16 and the post-1987-amendment version of section 95.16 should be construed. Additionally, the interpretation of the pre-amendment section 95.16 could affect title to numerous parcels of land throughout Florida. For these reasons, the Hectors file this brief in support of the respondent Eula Swann ("Swann"). The parties to this petition have indicated that they do not oppose the filing of this amicus brief.

STATEMENT OF THE CASE AND FACTS

The Hectors take issue with a statement included in the Statement of the Case and Facts in the brief of petitioners, William W. Seton and G. Jewell Seton ("the Setons"), in which the Setons state that "[i]n reaching [its] decision, the Fifth District Court of Appeal[] criticized and disagreed with this Court's opinion in Seddon v. Harpster, 403 So. 2d 409 (Fla. 1981) . . ." (Petitioners' Brief at 3). While it is true that the district court disagreed with the decision of the Second District Court of Appeal in Turner v. Valentine, 570 So. 2d 1327 (2d DCA 1990), review denied, 576 So. 2d 294 (Fla. 1991), see (Petitioners' Brief at 3), the district court did not criticize or disagree with this Court's decision in Seddon. The district court properly distinguished Seddon as interpreting a subsection of 95.16 that no longer exists and that does not apply in this case. See Swann v. Seton, 629 So. 2d 935 (Fla. 5th DCA 1993).

In all other aspects, the Hectors adopt the Statement of the Case and Facts set forth in respondent Eula M. Swann's brief, which, in turn, adopts the Statement of the Case and Facts set forth in the Setons' brief with certain noted exceptions.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal's decision below is correct and should be upheld. The district court found that a property owner may obtain title to another's land pursuant to section 95.16 only if the property owner does one of the things listed in the statute as showing possession -- i.e., cultivates

or improves or substantially encloses the land -- and the property owner has "color of title," a written instrument included in the public record including within the description the land the property owner seeks to adversely possess. These requirements are supported by the plain language of section 95.16.

The district court's decision is consistent with the law of this Court, basic principles of statutory construction, public policy, and common sense. The district court correctly found that this Court's decision in Seddon v. Harpster, 403 So. 2d 409 (Fla. 1981) -- which found that, under the pre-1987-amendment version of section 95.16, a property owner with paper title to his land could obtain adverse possession of contiguous property without paper title to the land by substantially enclosing the disputed property -- must be limited to its facts and to its interpretation of a subsection of 95.16 that no longer exits. The finding of the Second District Court of Appeal in Turner v. Valentine, 570 So. 2d 1327 (2d DCA 1990), review denied, 576 So. 2d 294 (Fla. 1991), and the language of the First District Court of Appeal in Bailey v. Hagler, 575 So. 2d 679 (1st DCA), review denied, 587 So. 2d 1327 (Fla. 1991), which are relied upon by the Setons here and which suggest that Seddon has application to other types of possession under section 95.16, as defined by section 95.16(2), is insupportable under both the language of Seddon and the statute itself.

The Seddon Court, in interpreting the pre-1987 amendment version of section 95.16, created a "window" period, nonexistent before, in which a property owner of nonplatted land, with record

title to his land, could obtain by adverse possession land contiguous to his own without paper title by substantially enclosing that property for seven years. When, in 1987, the Legislature amended section 95.16 to eliminate this anomaly, it intentionally closed that window. The Legislature did not create the absurd result that the petitioners here argue was created -- that, while paper title is required for adverse possession via a substantial enclosure, see § 95.16(2)(b), Fla. Stat. (1993), it is not required when adverse possession is established under other types of "possession" as defined by section 95.16(2), including cultivating or improving the property (planting a flowerbed, weeding, or mowing the lawn) or utilizing the property for ordinary use (treating it as one's own). But, the Setons would have this Court believe that that is what the Legislature intended, even in a case, such as this one, in which the disputed land is platted and the correct boundaries of those plats are readily ascertainable from the public record. If accepted, their reading of Seddon and section 95.16 would eliminate the true distinction between adverse possession claims based on color of title, id. § 95.16, and those that are not based upon color of title. Id. § 95.18.

The Setons' interpretation of section 95.16 defies common sense and public policy. In modern-day subdivisions, a property owner is on clear notice as to the correct boundaries of his land, irrespective of whose lawn he is mowing or where his fence is located. This case is significant, but not difficult. The Fifth District's decision should be upheld.

ARGUMENT

I.

THE FIFTH DISTRICT COURT OF APPEAL CORRECTLY RULED THAT THE CURRENT VERSION OF SECTION 95.16 ALLOWS A PROPERTY OWNER TO ADVERSELY POSSESS LAND PURSUANT TO THAT STATUTE ONLY WHEN THAT OWNER HAS PAPER TITLE CORRECTLY DESCRIBING THAT LAND

The Fifth District Court of Appeal's decision is the correct interpretation of section 95.16. Its decision is consistent with the plain meaning of the statute, does not conflict with precedent of this Court, and is supported by the legislative history of the 1987 amendments to section 95.16.

A. The District Court's Decision Is Consistent With the Plain Meaning of Section 95.16 and There Is No Principled Reason Not To Give the Statute Its Plain Meaning

This Court's "initial responsibility when construing a statute is to give the words their plain and ordinary meaning." Silva v. Southwest Fla. Blood Bank, Inc., 601 So. 2d 1184, 1186 (Fla. 1992). The Fifth District Court of Appeal correctly interpreted the plain language of the current version of section 95.16 as requiring a two-step analysis for establishing an adverse possession claim with color of title.[1/] As the

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1/ Section 95.16 currently provides:

95.16 Real property actions; adverse possession under color of title.--

(1) When the occupant, or those under whom he claims, entered into possession of real property under a claim of

(Footnote continued on next page.)

District Court explained:

> First, subsection one requires that the real property in question be described in a written instrument recorded in the official records of the county. Next, the subsection requires that the real property in question be possessed continuously for a period of seven years. Both requirements must be met in order for one relying on the statute to acquire title through adverse possession by color of title. Subsection two merely describes what the legislature regards as possession of the property in question.

Swann, 629 So. 2d at 937.

(Footnote continued from previous page.)

> title exclusive of any other right, founding the claim on a written instrument as being a conveyance of the property, or on a decree or judgment, and has for 7 years been in continued possession of the property included in the instrument, decree, or judgment, the property is held adversely. If the property is divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract. Adverse possession commencing after December 31, 1945 shall not be deemed adverse possession under color of title until the instrument upon which the claim of title is founded is recorded in the office of the clerk of the circuit court of the county where the property is located.
>
> (2) For the purpose of this section, property is deemed possessed in any of the following cases:
>
> (a) When it has been usually cultivated or improved.
>
> (b) When it has been protected by a substantial enclosure. All land protected by the enclosure must be included within the description of the property in the written instrument, judgment, or decree. If only a portion of the land protected by the enclosure is included within the description of the property in the written instrument, judgment, or decree, only that portion is deemed possessed.
>
> (c) When, although not enclosed, it has been used for the supply of fuel or fencing timber for husbandry or for the ordinary use of the occupant.
>
> (d) When a known lot or single farm has been partly improved, the part that has not been cleared or enclosed according to the usual custom of the county is to be considered as occupied for the same length of time as the part improved or cultivated.

Applying the plain language of section 95.16 to the facts of this case, the District Court correctly held that the Setons cannot assert a claim of adverse possession under the current version of section 95.16 because they do not have paper title correctly describing the property that is the subject of the dispute and that has been filed in the official records of the county where the property is located. Id.

The analysis is over. The Setons lose.

Faced with certain loss pursuant to a plain-meaning interpretation of section 95.16, the Setons offer a different interpretation of section 95.16, one that is not in any manner supported by the plain language of the statute. They argue that paper title is required under section 95.16 only when one is attempting to adversely possess property through the use of a substantial enclosure, § 95.16(2)(b), Fla. Stat. (1993), but not when possession is established under other subsections of 95.16(2). See id. §§ 95.16(2)(a), (c)-(d). In other words, according to the Setons, when a property owner substantially encloses contiguous property for seven years -- i.e., through the placement of a fence around the contested property -- that property owner also must have a written document in the form of a deed or a judgment which describes the contested property and which has been recorded in the official records of the county in order to establish a claim of adverse possession. Id. § 95.16(2)(b). If, however, the property owner proves that he has "possessed" the same property for seven years through other methods detailed in section 95.16(2)(b), e.g., (1) cultivating or

improving the property (planting a flowerbed, weeding, or mowing the lawn) or (2) utilizing the property for his ordinary use (treating the contested property as his own), then paper title is not required in order for that property owner to usurp the title of that property from its rightful owner. And, this is true, according to the Setons, even in a case such as this one in which the disputed land is platted and the correct boundaries of those plats are readily ascertainable from the public record.

The initial problem with the Setons' interpretation is, of course, that they effectively have written out the "color of title" requirement contained in subsection (1). Such a reading of a statute is prohibited. This Court before has felt "compelled by well-established norms of statutory construction to choose that interpretation of statutes and rules which renders their provisions meaningful. Statutory interpretations that render statutory provisions superfluous 'are and should be, disfavored.'" Johnson v. Feder, 485 So. 2d at 409, 411 (Fla. 1986) (citations omitted).

To support their awkward interpretation of the statute and to explain why this Court should ignore the plain meaning of the statute, the Setons attempt two tacts. First, they urge that section 95.16 should be read in pari materia with the common law of Florida regarding "boundary by acquiescence" and "boundary by agreement" so that the principles of those common-law doctrines are "'harmonize[d]'" with section 95.16. (Petitioners' Brief at 5, 12) (citing 49 Fla. Jur. 2d Statutes § 172, at 206 (1984)). This argument is meritless.

The very authority the Setons cite for this proposition undermines their argument. The treatise cited by the Setons clearly states -- in the paragraph immediately following the paragraph they cite for their "harmonizing with the common law" principle -- that:

> the common law may be modified, directly or indirectly, by the enactment of a statute that is inconsistent with it. Thus, the rule that statutes are to be construed with reference to appropriate principles of the common law does not apply when the language of the statute cannot be given its apparent meaning and purpose without upsetting a common-law rule.

Statutes, supra, at 206 (citing Cragin v. Ocean & Lake Realty Co., 101 Fla. 1324, 133 So. 569 (1931), appeal dismissed, 286 U.S. 523, 52 S. Ct. 494, 76 L.Ed. 1267 (1932)). In other words, if the long-standing common-law principle at issue is contradicted by the plain meaning of the statute, the common-law principle must fall. Therefore, if, in fact, "boundary by acquiescence" and "boundary by agreement" do contradict the plain meaning of section 95.16, as the Setons have argued, the plain meaning of section 95.16 prevails.

This is consistent with this Court's oft-repeated pronouncement that "[w]here . . . the language of a statute is clear and unambiguous the language should be given effect without resort to extrinsic guides to construction." Lamont v. State, 610 So. 2d 435 (Fla. 1992).

In any event, neither "boundary by acquiescence" nor "boundary by agreement" has any application to the circumstances covered by section 95.16, and thus these principles do not

conflict with the plain meaning of the statute. In Florida, boundary by acquiescence requires that the parties to a boundary dispute recognize that uncertainty exists with respect to the true boundary. Shaw v. Williams, 50 So. 2d 125, 126 (Fla. 1950). And, as the Setons themselves admit, "boundary by agreement" occurs when the parties orally agree upon a boundary line. (Petitioners' Brief at 12 n.16) (citing 1 Fla. Jur. 2d Adjoining Landowners § 39 (1984)). In contrast, adverse possession pursuant to section 95.16 occurs, not when there is a dispute as to the proper location of a boundary line or where there is an agreement about the location of a boundary line, but when a party has paper title to a portion of another's land and acts in a manner consistent with ownership to that land for a period of seven years. There is nothing to "harmonize" between these common-law doctrines and the statute.

The Setons' second argument to displace the plain language interpretation of the statute is simply to rewrite the statute completely. Incredibly, the Setons add in the words "in good faith, believes to be" to the new statute in brackets on page five of their brief as an indication of what they contend the statute really means. All they accomplish in adding this language is to prove conclusively that the post-1987-amendment version of the statute does not have any such "good faith" requirement at all. The amended statute is clear on its face and it defeats the Setons' argument. "It is neither the function nor the prerogative of the courts to speculate on constructions more or less reasonable, when the language itself conveys an

unequivocal meaning." Heredia v. Allstate Ins. Co., 358 So. 2d 1353, 1355 (Fla. 1978). The language of the statute should be given its plain meaning:

B. The District Court's Decision Is Not Inconsistent With This Court's Decision in Seddon v. Harpster

The district court correctly held that Seddon v. Harpster, 403 So. 2d 409 (Fla. 1981), opened a narrow exception to the paper title requirement of subsection (1) in its interpretation of the pre-1987 amendment to section 95.16. Interpreting the express language of subsection (2)(b) as it then existed, Seddon reasoned that when disputed property is contiguous and has been substantially enclosed for seven years, it is deemed to be "property included within the written instrument, judgment, or decree, within the purview of this section." § 95.16(2)(b) (pre-1987 amendment version).2/ As the district court found, however, "nothing in Seddon implies that it should be applied to cases other than those in which the claim of adverse possession is based upon substantial enclosure of the disputed land." Swann, 629 So. 2d at 938. And, most

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2/ Prior to the 1987 amendment, section (2)(b) of 95.16 read:

> (2) For purposes of this section, property is deemed possessed in any of the following cases: . . .
>
> (b) When it has been protected by a substantial enclosure. All contiguous land protected by the enclosure shall be property included within the written instrument, judgment, or decree, within the purview of this section . . .

95.16(2)(b), Fla. Stat. (pre-1987 amendment) reprinted in Seddon v. Harpster, 369 So. 2d 662, 665 (2d DCA 1979), aff'd, 403 So. 2d 409 (Fla. 1981).

significantly, the provision of section (2)(b) that the Legislature interpreted to arrive at that result was substantially altered by the Legislature in 1987 to overrule Seddon. The Setons' reliance on Seddon (and the unwarranted extension of Seddon in dicta by Turner, 570 So. 2d at 1327), to support their position that -- because the Legislature did not alter the other subsections of 95.16(2) -- the current version of section 95.16 should be interpreted to mean that paper title is not required when possession is demonstrated under any subsection of 95.16(2) other than subsection (2)(b) is wrong. It is at odds with the reasoning of the Seddon decision and the clear intent of the Legislature in enacting the 1987 amendments.

1. Seddon Held Only That, Under the Pre-1987 Amendment Version of Section 95.16, One Did Not Need Paper Title Correctly Describing the Disputed Property As Long As That Area Was Contiguous to the Described Land and Protected By a Substantial Enclosure

The Seddon decision is very narrow and centers solely on a reading of subsection (2)(b) of the pre-1987-amendment version of section 95.16 and the possible effect of the 1974 amendment to section 95.16. Seddon involved a boundary dispute in which the plaintiffs, the Harpsters, brought an ejectment action against their neighbors, Ms. Seddon, in 1975. Seddon, 403 So. 2d at 410. The Harpsters claimed that Ms. Seddon was wrongfully occupying a portion of their property. The property in question was unplatted, rural land in Lake County, Florida. In response

to the Harpsters' suit, Ms. Seddon asserted a claim to the disputed property through adverse possession with color of title, under the pre-1987 amendment version of the statute. Id.[3/]

Though Ms. Seddon did not have a written instrument correctly describing the disputed property (she had only the deed to her own property, which did not describe the disputed area), her section 95.16 claim was based upon the fact that her predecessors in title had erected a fence in 1964 based on a survey that had showed incorrectly the true boundary between her property and her neighbors' property. Id. Ms. Seddon's fence substantially enclosed the contested land from 1964 until 1975, the time that the suit was brought. Id. at 412. The trial court found that Ms. Seddon had not established that she had color of title to the disputed property under the pre-1987 statute.

The Second District Court of Appeal affirmed, finding that, under the version of Section 95.16 as amended in 1974, it "appear[ed]" that paper title was not necessary in the circumstances of Ms. Seddon's case. Seddon v. Harpster, 369 So. 2d 662, 666 (2d DCA 1979), aff'd, 403 So. 2d 409 (Fla. 1981). But, the Second District reasoned that, because the amendment did

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3/ In addition to her 95.16 claim, Ms. Seddon also asserted a claim to the disputed property under section 95.18, adverse possession without color of title. The Seddon Court easily rejected that claim, holding that, because Ms. Seddon had not paid taxes on the property that she was attempting to adversely possess, she could not establish a claim without color of title pursuant to section 95.18, which requires payment of taxes on the disputed property in order to establish adverse possession under that statute. As the Court explained, Mr. Seddon "had paid taxes based on the legal description in her deed," Seddon, 403 So. 2d at 410, which did not describe the contested property.

not become effective until January 1, 1975, Ms. Seddon could not establish title in this manner until 1982. Id.

Nonetheless, uncertain whether the 1974 amendment to section 95.16 should be applied retroactively, the Second District certified the following question to the Florida Supreme Court as a matter of great public importance:

> DID THE SEVEN-YEAR PERIOD OF CONTINUAL POSSESSION NECESSARY TO ESTABLISH ADVERSE POSSESSION UNDER COLOR OF TITLE BEGIN ON THE EFFECTIVE DATE OF CHAPTER 74-382, OR COULD IT HAVE BEGUN BEFORE THAT TIME WHERE:
>
> > (1) THE CLAIMANT'S PAPER TITLE DID NOT PROPERLY DESCRIBE THE DISPUTED PROPERTY; YET,
> >
> > (2) THE DISPUTED PROPERTY HAD "BEEN PROTECTED BY A SUBSTANTIAL ENCLOSURE" FOR MORE THAN SEVEN YEARS PRIOR TO 1975?

Id. at 667.

In response to the certified question, this Court held that Ms. Seddon could not assert a claim of adverse possession under the pre-1987-amendment, post-1974-amendment version of section 95.16 because she had not met the seven-year possession requirement under that statute. As the Court explained:

> [T]he seven-year period of continual possession necessary to establish adverse possession under color of title begins on the effective date of chapter 74-382, Laws of Florida, i.e., January 1, 1975. The effective date is unaffected by the fact that although claimant's paper title did not describe the disputed property, that area had been protected by a substantial enclosure for more than seven years prior to 1975.

Seddon, 403 So. 2d at 411-12.

Thus, Seddon held simply that Ms. Seddon had not established a fundamental element of her claim under the pre-1987-amendment, post-1974-amendment version of section 95.16.

In reaching this holding, the Seddon Court examined the impact of the 1974 amendment to sections 95.16 and 95.17 on the requirements of adverse possession through substantial enclosure. Initially, the Court noted that under the pre-1974-amendment version of the statute -- there were two sections governing adverse possession with color of title at that time: section 95.16, which defined the general requirements of adverse possession with color of title and section 95.17, which defined possession[4/] --

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4/ The pre-1974-amendment statutes governing adverse possession with color of title provided:

> 95.16 Real actions: adverse possession under color of title; requirements. Whenever it appears that the occupant or those under whom he claims, entered into possession of premises under claim of title exclusive of any other right, founding such claim upon a written instrument as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the premises included in such instrument, decree, or judgment for seven years, the premises so included shall be deemed to have been held adversely, except that, where the premises so included consists of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract; provided that adverse possession commencing after December 31, 1945, shall not be deemed to be adverse possession under color of title unless and until the instrument of conveyance of the premises in question upon which such claim of title is founded shall be duly recorded in the office of the clerk of the circuit court of the county in which the premises are situated.
>
> 95.17 Definition of possession and occupation under color of title. For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or a judgment or decree, land

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Ms. Seddon would not have been able to assert a claim despite the fact that she had substantially enclosed the disputed property for the requisite seven years. Citing Meyer v. Law, 287 So. 2d 37 (Fla. 1973), the Seddon Court explained that, prior to the 1974 amendments, sections 95.16 and 95.17 had been interpreted to mean that "adverse possession under color of title could only arise where the claimant had 'paper' title accurately describing the disputed property." Seddon, 403 So. 2d at 411 (emphasis in original). Thus under Meyer and the pre-1974 amendment version of section 95.16, Ms. Seddon "could not have acquired the land by adverse possession under color of title because at the time from which she claims possession, her deed's legal description did not indicate the area between the true boundary and the fence." Id.

(Footnote continued from previous page).

> shall be deemed to have been possessed and occupied in any of the following cases:
>
> (1) Where it has been usually cultivated or improved; or
> (2) Where it has been protected by a substantial enclosure. All contiguous land protected by such substantial enclosure shall be deemed to be premises included within the written instrument, judgment; or decree, within the purview of § 95.16; or
> (3) Where (although not enclosed) it has been used for the supply of fuel, or of fencing timber for the purpose of husbandry, or for the ordinary use of the occupant; or
> (4) Where a known lot or single farm has been partly improved, the portion of such farm or lot which may have been left not cleared or not enclosed according to the usual course and custom of the adjoining county shall be deemed to have been occupied for the same length of time as the part improved or cultivated.

§§ 95.16, .17, Fla. Stat. (pre-1974 amendment).

Relying on the usual presumption that when the Legislature amends a statute it intends to accord the statute a different meaning from that accorded it before the amendment and the coincidental fact that the 1974 amendments to sections 95.16 and 95.17 were enacted in the legislative session immediately following the Meyer decision, the Seddon court interpreted these amendments as effectively overturning Meyer. Reading the language of subsection (2)(b) as overcoming the subsection (1) requirement of the paper title describing the disputed property, the Seddon majority determined that "the new statute clearly states that one does not have to have paper title correctly describing the disputed property as long as that area is contiguous to the described land and 'protected by a substantial enclosure.'" Id. at 411 (citation omitted).5/

5/ As noted infra, the legislative history to the 1987 amendment to section 95.16 shows that the Seddon court misinterpreted the legislature's intent when it amended the statute in 1974. The purpose of the 1974 amendments was "housecleaning": the Legislature simply combined sections 95.16 and 95.17 and deleted redundant language. See infra Point (I)(B)(2) (referring to the legislative history of the 1974 amendment). Indeed, that housecleaning and not the reversal of Meyer was the goal of the Legislature is further evidenced by the fact that similar changes were made to sections 95.18 and 95.19. If it was the Legislature's intent to reverse Meyer, changes to sections 95.18 and 95.19 certainly were not necessary.

If anything, the language of the statute after the 1974 amendments to subsection (2)(b) indicate that the Legislature wanted to codify Meyer, not reverse it, and clarification is often the goal of a legislative amendment. See infra note 7 and authority cited. Prior to the 1974 amendments, the corresponding

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Accordingly, Seddon did not interpret the pre-1987 amendment version of section 95.16 as abandoning altogether the

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provision of what was later section 95.16 (2)(b) provided:

> all contiguous land protected by such substantial enclosure shall be deemed to be premises included within the written instrument, judgment, or decree, within the purview of § 95.16 ...

§ 95.17(2), Fla. Stat. (1971).

In Meyer, this Court read the above language in pari materia with then Section 95.16, Florida Statutes (1971), and concluded that the requirement of a written instrument describing the contested property applies even to situations covered by subsection 95.17(2). The only way the Meyer Court's interpretation of those statutes would have been correct is if the Meyer Court interpreted the "shall be deemed" language of subsection 95.17(2) to mean "must." Thus, the Meyer Court concluded that subsection 95.17(2) was the Legislature's expression of a reaffirmation of the paper title requirement contained in 95.16, even in situations in which property owner had substantially enclosured contiguous property.

In the 1974 amendments, the Legislature codified and reaffirmed the Meyer Court's interpretation of subsection 95.17(2). In addition to combining section 95.17 with section 95.16, the Legislature changed the relevant portion of 95.17(2) to read:

> All contiguous land protected by the enclosure shall be property included within the written instrument, judgment, or decree, within the purview of this section...

§ 95.16(2)(b), Fla. Stat. (1975) (emphasis added).

To further shore up the holding of Meyer and the understanding that "shall be deemed to be" should be interpreted as meaning "must," the Legislature dropped the words "be deemed to be" after the word "shall" in the statute. Clearly, then, with the statute now reading that all contiguous land "shall" be included in the written instrument recorded in the public record, the Legislature intended to mean that a person claiming adverse possession to contiguous property with color of title had to have a written instrument correctly describing that land recorded in

(Footnote continued on next page).

requirement of paper title describing the disputed property in all circumstances, as the Setons urge. Instead, Seddon merely found an exception to the proper title requirement in the specific language of then-subsection (2)(b) -- not contained in the other subsections of section 95.16(2) -- and interpreted that language to mean that when property is contiguous to land to which a claimant had proper title and the claimant had substantially enclosed that land, it was automatically deemed to be included in the description of the paper title in the possession of the claimant. The Setons' reading of Seddon would require that language similar to that found in the pre-1987-amendment version of subsection (2)(b) also be present in every other subsection of 95.16(2), and that is not the case. The Setons' argument is, therefore, without merit.

The Setons' reliance on the interpretation of Seddon in two other cases -- Turner, 570 So. 2d at 1327 and Bailey,

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the public record "shall" means "must." Black's Law Dictionary, at 1375 (6th ed. 1990). It is unclear why the Seddon court interpreted the word "shall" to mean "shall be considered to be" and determined that the previous language "shall be deemed" to not mean "shall be considered to be." One would think that the opposite would have been more logical.

In short, the Seddon decision most easily can be explained by the apparent fact that neither litigant in the case seriously contested whether the 1974 amendment to section 95.16 affected a substantive change to the statute. Instead, as noted above, the battle fought in the case concerned whether the change everyone assumed had occurred should be applied retroactively.

575 So. 2d at 679 -- is equally unavailing. In first instance, the portion of Valentine upon which the Setons rely is dicta. The Setons tout Valentine as a case in which the facts "are remarkably close to those of the instant case." (Petitions' Brief at 8). In fact, there is an important difference between Valentine and this case, one that clearly distinguishes Valentine: the claimants in Valentine possessed a deed that described the disputed property, the Setons do not.

The disputed property in Valentine lay between the platted boundary line, which denoted the true line, and the bank of a creek, which had moved over the course of time giving the Valentine claimants more than their platted lines allowed. The Valentine claimants' deed described the boundary in terms of the plat, but also described the boundary as extending to "the center line of [the] creek."[6/]

Thus, the Valentine claimants, unlike the Setons, had the necessary color of title to enable them to assert a claim under the pre-1987-amendment-version of section 95.16 using any

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6/ The Valentine claimant's deed provided:

> The East 151.39 feet of Lot 12, FAIR OAKS DIVISION (also known as that part of Lot 12, lying east of the center line of Allen's Creek, FAIR OAKS SUBDIVISION), according to the Map or Plat thereof, as recorded in Plat Book 41, page 34, Public Records of Pinellas County, Florida.

Valentine, 570 So. 2d at 1328.

of the definitions of "possession" found in subsection (2) of the statute. In short, the Valentine claimants met the first requirement of the statute, "color of title". The result in Valentine is, therefore, simply a straightforward application of the plain meaning of section 95.15.

Dicta in Valentine, however, unnecessarily expanded the Seddon exception to the section 95.16(1) paper-title requirement that the Seddon court had found in section 95.16(2)(b). With no basis for doing so, the Valentine Court read Seddon as "controlling authority for the proposition that absolutely accurate paper title is not necessary when making a claim for adverse possession regardless of the subsection under which the adverse possession claim is made." Valentine, 570 So. 2d at 1329. This is clearly an incorrect statement of the Seddon Court's interpretation of the pre-1987 amendment version of section 95.16. As the district court found here, "Seddon neither holds, nor does subsection 95.16(2)(c) evidence a legislative intent, that adverse possession by color or title can be accomplished by ordinary and continuous use of contiguous property." Swann, 629 So. 2d at 938. Valentine offers no rationale for its expansion of the narrow exception opened by Seddon, nor is there one. The district court's rejection of Valentine was correct, and this Court also should reject it.

Bailey, too, offers no support for the Setons' argument that the Seddon exception to the paper-title requirement should be expanded beyond section 95.16(2)(b) of the pre-1987-amendment version of section 95.16. Perhaps, this is why the Setons

relegate it to a one-sentence footnote and a simple quote in their brief. See (Petitioners' Brief at 4, 6).

Bailey incorrectly cites Seddon by adding language that is not in the opinion. The Bailey court, for some unknown reason, replaced key language in the holding of Seddon with overbroad and inaccurate language. Seddon held, "the new statute clearly states that one does not have to have paper title correctly describing the disputed property as long as that area is contiguous to the described land and 'protected by a substantial enclosure.'" Seddon, 403 So. 2d at 411 (quoting § 95.16, Fla. Stat.) (Supp. 1974)) (emphasis added). Bailey misquotes this passage by replacing the italicized portion above with the following material in brackets: "[meets one of the criteria enumerated at section 95.16(2)(a)-(d)]." Bailey, 575 So. 2d at 681.

Nothing in Seddon shows that its analysis of subsection (2)(b) of 95.16 could be applied to the other subsections of 95.16(2). This portion of Bailey is simply poor drafting and thus pure dicta.[7/] Thus, neither Seddon, Valentine, nor Bailey supports the Setons' contention that the pre-1987 amendment version of section 95.16 was designed, or should be read, to eliminate the requirement that a person claiming adverse possession based upon 95.16 had to have paper title describing

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7/ Though Bailey incorrectly cites Seddon, adding language that is not in the opinion, the decision in Bailey is simply a direct application of Seddon. The claimant in Bailey asserted a claim of adverse possession under the pre-1987-amendment version of section 95.16 based on the fact that she had substantially enclosed the disputed contiuguous property with a fence. See Bailey, 575 So. 2d at 680, 682.

the disputed property other than in circumstances set forth in subsection 95.16(2)(b).

Finally, and perhaps most importantly, the Setons' reliance upon Seddon is misplaced because, as the district court found, "Seddon has been effectively overruled by the legislature." Swann, 629 So. 2d at 938. The new section 95.16, as the Setons themselves agree, eliminated the provision that a property owner could obtain title to contiguous property through adverse possession by simply substantially enclosing that property. Moreover, in so doing, the Legislature substantially altered the very provision of section 95.16 interpreted by the Seddon court. Any reliance upon Seddon in the face of the amended statute is thus unwarranted. St. Petersburg Bank & Trust Co. v. Hamm, 414 So. 2d 1071, 1074 (Fla. 1982) (rejecting prior case law regarding usury in the face of plain and unambiguous statute).

2. The Legislature Overruled Seddon in 1987, And, In So Doing, the Legislature Did Not Mean That the Seddon Rule Should Be Applied to Other Types of Possession Other Than Substantial Enclosures

Even if the current section 95.16 were not clear and unambiguous, which it is, the Setons' interpretation of legislative intent in amending the statute is misguided.[8/] The

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[8/] Again, this Court need look at such extrinsic guides to construction as legistative intent only if it determines that the language of section 95.16 as ambiguous, Lamont, 610 So. 2d at 437, which it is not. See, supra Point (I)(A).

Setons argue that the Legislature, in eliminating the anomaly in section 95.16 that one could adversely possess property without color of title through the substantial enclosure of contiguous property, intended to allow property owners to obtain title to property pursuant to section 95.16 if that owner "possessed" the disputed property for seven years in the other statutorily defined manners (such as cultivating the land or using the property for his or her own use), § 95.15(2)(a),(c), Fla. Stat. (1993). The Setons' interpretation of the 1987 amendment to 95.16 defies logic, is contrary to the legislative history of the amendment, and would create an absurd result.

The Setons rely upon the maxim "[e]xpressio unius est exclusio alterius" for the proposition that, because the Legislature did not alter subsection (2)(a) or (2)(c) of the statute, they must have intended to maintain the status quo with respect to the judicial construction of those subsections. This is correct.

The Setons err in their presumption that the status quo of the judicial construction of subsections (2)(a) and (2)(c) at the time of the 1987 amendment did not require paper title describing the disputed property for purposes of asserting an adverse possession claim pursuant to those subsections, irrespective of the plain meaning of subsection (1). That was not the law.

It was not until after the 1987 amendment to section 95.16 that any court interpreted this Court's decision in Seddon

so broadly. See, e.g., Valentine, 570 So. 2d at 1329. Prior to the 1987 amendment, two courts had interpreted Seddon to hold only that one did not have to have paper title correctly describing the disputed property as long as that area was contiguous to the described land and protected by a substantial enclosure. Elizabethan Dev., Inc. v. Magwood, 479 So. 2d 251 (Fla. 2d DCA 1985); Revels v. Sico, Inc., 468 So. 2d 482 (Fla. 2d DCA 1985).

Thus, when the Setons rhetorically wonder why the Florida Legislature did not specifically state in the amended statute that other forms of possession pursuant to section 95.16 also would require paper title, (Petitioners' Brief at 7), the short answer is that no one understood that Seddon would receive such a bizarre and unwarranted interpretation as that given it by the Valentine court.

Indeed, that this is true is shown by the legislative history of the amendment to section 95.16. Included in the appendix to this brief are documents showing the genesis of the 1987 amendment to section 95.16. These materials are appropriate in determining legislative intent. See Asphalt Pavers, Inc. v. Department of Revenue, 584 So. 2d 55 (Fla. 1st DCA 1991); see also Ellsworth v. Insurance Co. of N. Am., 508 So. 2d 395, 398 (Fla. 1st DCA 1987)("Florida Appellate courts may consider legislative staff summaries in construing statutes . . . [and s]uch reports may be consulted in the course of the

Court's independent research, through advocacy, or through introduction into the record at the trial level by judicial notice.").

In a letter dated October 24, 1986, an attorney, William D. Anderson, Jr., wrote to State Senator William "Doc" Meyers criticizing the result in Seddon and questioning whether it was the result that the Legislature intended. Mr. Anderson noted that, pursuant to the Seddon and Elizabethan courts' interpretation of section 95.16, all contiguous lands protected by a substantial enclosure would be considered property included within the adverse possessor's written instrument even though the written instrument itself did not include that property. He observed, "The net effect of the amendment [in 1975 as interpreted by Seddon and Elizabethan] will be to require every person to survey their property every time a hedge or fence is planted to insure that they don't lose it through adverse possession." Letter of William Anderson, Jr. to Hon. William Meyers, Oct. 24, 1986, at 1. Anderson then requested that Meyers, "forward [the matter] to the proper legislative review committee to consider eliminating the amendment dealing with contiguous lands and restore the adverse possession under color of title to its previous form." Id. at 2.

Two months later, Staff Attorney Phyllis Slater of the Florida Senate Committee on Judiciary-Civil prepared a legal memorandum to file and a letter to Senator Myers recommending that section 95.16 be amended to eliminate the ability of a landowner to obtain title to contiguous land pursuant to

section 95.16 by substantially enclosing that land when the landowner does not have paper title correctly describing the land. In her memo, Ms. Slater noted that this Court in Meyer v. Law, 287 So. 2d 37 (Fla. 1973), had "interpreted the statutory predecessors of s. 95.16, F.S., to hold that adverse possession under color of title could only arise where the claimant had paper title accurately describing the disputed property." Memorandum of Phyllis Slater, Staff Attorney of the Comm. on Judiciary-Civil, The Florida Senate, Dec. 10, 1986, at 1. Ms. Slater further noted that, in 1974, the Legislature modified 95.16 for purposes of housecleaning, as indicated by the legislative history of the 1974 amendment. Id. Despite the fact that the Legislature did not intend to change the substance of section 95.16, Ms. Slater explained that the Seddon Court interpreted the minor, housecleaning changes to mean that "'one does not have to have paper title correctly describing the disputed property as long as that area is contiguous to the described land and 'protected by a substantial enclosure.'" Id. at 2 (quoting Seddon, 403 So. 2d at 411 (quoting 95.16, Fla. Stat.)).[9/]

9/ Ms. Slater's finding that the minor changes made to section 95.16 in 1974 were not intended to effectuate substantive changes is supported by the statutory construction principle that "a mere change in the language of a statute does not necessarily indicate an intent to change the law, because the intent may be to clarify what was doubtful or to safeguard misapprehension to existing law." Asphalt, 584 So. 2d at 58 (citing State ex rel. Szabo Food Servs., Inc. v. Dickinson, 286 So. 2d 529 (Fla. 1973)). Accord Keyes Investors v. Department of State, 487 So. 2d 59, 60 (Fla. 1st DCA 1986). Included in the appendix to this brief are legislative history materials that show Ms. Slater was absolutely correct regarding her interpretation of the 1974 amendments.

Ms. Slater then identified this portion of Seddon as dicta because the actual issue in Seddon was whether section 96.15, as amended in 1974, could be interpreted retroactively. Id. at 2-3. Notwithstanding that this portion of Seddon was dicta, Ms. Slater noted that the Second District in Elizabethan and Revels (the latter itself in dicta) had cited Seddon "for holding that you do not have to have paper title describing the disputed property as long as that area is contiguous to the described land and protected by a substantial enclosure." Id. at 3. For this reason, Ms. Slater indicated that the Committee recommended that the Legislature modify section 95.16 in order to overturn the interpretation of Seddon found in Elizabethan and Revels. Ms. Slater summarized the above analysis of the Committee in her letter to Senator Myers. Letter to Sen. William Meyers from Phyllis Slater, Staff Attorney of the Committee on Judiciary-Civil, the Florida Senate, Dec. 10, 1986.

Finally, the Staff Report to Senate Bill 417, which was sponsored by Senator Myers and which ultimately became the amendment to section 95.16, shows that the amendment to section 95.16 clearly was intended only to "clarif[y] . . . that all land protected by the [substantial enclosure referred to in 95.16(2)(b)] must be included within the written instrument, judgment, or decree. If only a portion of the land protected by the enclosure is included within the written instrument,

judgment, or decree, only that portion is adversely possessed." Florida Senate Staff Analysis and Economic Impact Statement, Apr. 21, 1987, at 1.

The foregoing legislative history of the amendment to section 95.16 is very telling and refutes the Setons' off-the-cuff interpretation of the meaning of the Legislature's action in 1987. First, contrary to the assertions of the Setons, the sponsors of the bill amending section 95.16 did not approve of the Seddon decision, but instead determined that the decision was itself an incorrect interpretation of the Legislature's housecleaning amendment in 1974. The sponsors also did not agree with the findings of the Second District Court of Appeal in Elizabethan and Revels -- that Seddon's conclusion that a property owner could obtain title to contiguous land through adverse possession without paper title correctly describing that land if the property owner substantially enclosed the land, was in fact the holding of Seddon. More importantly, however, it is clear from the legislative history that the sponsors of the 1987 amendment to section 95.16 considered the Seddon interpretation of subsection (2)(b) of 95.16 to be an anomaly. That the Legislature intended that color of title correctly describing the disputed land was absolutely necessary, irrespective of how the disputed land was possessed by the would-be adverse possessor, is clear.

Indeed, any other interpretation of the effect of the 1987 amendment would disrupt the balance between adverse

possession with color of title and adverse possession without color of title. Section 95.18 of the Florida Statutes governs situations in which a prospective adverse possessor does not have paper of title to the land he seeks to obtain through adverse possession. Section 95.18 provides that, if title to property is to be obtained through adverse possession without color of title, the would-be possessor must pay property taxes within one year after entering the property and must subsequently pay all taxes and levies on the property. § 95.18(1), Fla. Stat. (1993).[10/] And, subsection (2)(b) of section 95.18 states that one manner to "possess" property pursuant to that statute is by usually cultivating and improving

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[10/] Section 95.18 provides:

> (1) When the occupant or those under whom he claims have been in actual continued occupation of real property for 7 years under a claim of title exclusive of any other right, but not founded on a written instrument, judgment, or decree, the property actually occupied shall be held adversely if the person claiming adverse possession made a return of the property by proper legal description to the property appraiser of the county where it is located within 1 year after entering into possession and has subsequently paid all taxes and matured installments of special improvement liens levied against the property by the state, county, and municipality.
>
> (2) For the purpose of this section, property shall be deemed to be possessed in the following cases only:
>
> a) When it has been protected by substantial enclosure.
>
> b) When it has been usually cultivated or improved.

§ 95.18, Fla. Stat. (1993).

the property. Id. § 95.18(2)(b). This is in fact the exact same manner that property can be adversely possessed with color of title pursuant to subsection (2)(a) of section 95.16. Id. § 95.16(2)(a). Why, if the Setons' interpretation of section 95.16 were correct, would one ever pay taxes on property that he wishes to possess adversely by cultivating or improving it when he could just as easily adversely possess that property and not pay taxes?

The Setons' interpretation of section 95.16 effectively makes subsection (2)(a) of section 95.18 meaningless, which is prohibited. "As a general rule of statutory construction, courts are required, where possible, to give compatible interpretations to statutes that relate to the same subject matter. The fact that those statutes may have been enacted at different times does not preclude reading and construing them in pari materia." In re: V.C.F., 569 So. 2d 1364, 1365 (Fla. 1st DCA 1990) (citations omitted).[11/]

Finally, the Setons' interpretation of section 95.16 simply does not make sense. The Setons acknowledge that paper title is required for claims pursuant to section 95.16 when possession is established through a substantial enclosure. § 95.16(2)(b), Fla. Stat. (1993). Yet, the Setons contend that no such requirement exists when possession is established under any other type of adverse possession pursuant to section 95.16.

11/ See also City of Indian Harbour Beach v. City of Melbourne, 265 So. 2d 422, 424 (Fla. 4th DCA 1972) ("courts should avoid statutory constructions which place statutes in conflict with each other") (citing Markham v. Blount, 175 So. 2d 526 (Fla. 1965); Howarth v. City of Deland, 117 Fla. 692, 158 So. 294 (1934)).

See id. §§ 95.16(2)(a), (c)-(d). Why would the Legislature amend section 95.16 in a manner that would result in a person more easily establishing adverse possession over contiguous property by merely planting a flowerbed or mowing the lawn than by constructing a fence?

The Setons provide no policy reason supporting this absurd result. Certainly, an owner whose land is sought through adverse possession would have greater notice that his neighbor was seeking possession of his land if his neighbor built a fence enclosing a portion of the owner's property than he would if his neighbor simply mowed that portion of the property. This Court should not interpret the amendment of section 95.16 as the Legislature's intent to make such an absurd result. "It is an axiom of statutory construction that an interpretation of a statute which leads to an unreasonable or ridiculous conclusion or a result obviously not designed by the legislature will not be adopted." Drury v. Harding, 461 So. 2d 104, 108 (Fla. 1984).

If accepted, the Setons' argument would result only in forcing the Legislature to amend section 95.16 yet again to achieve the result clearly evidenced by the plain language of the statute. That should be avoided.

II.

THE SETONS' INTERPRETATION OF SECTION 95.16 AND SEDDON, EXPANDING THE LATTER BEYOND CIRCUMSTANCES OF SUBSTANTIAL ENCLOSURE AND NONPLATTED PROPERTY, DOES NOT COMPORT WITH THE MODERN-DAY REALITIES OF PROPERTY OWNERSHIP IN PLATTED SUBDIVISIONS

The district court's decision should be upheld, if for no other reason, than it is consistent with public policy and

modern-day notions of property title. As the district court noted, in modern-day subdivisions,

> fences or other improvements are regularly constructed to promote security and privacy. The improvements often are not precisely located by installers and homeowners do not ordinarily incur the significant expense of purchasing a survey. If such errors in installation could result in loss of title to portions of lots, many boundaries in a subdivision would eventually be altered from those shown by the plat.

Swann, 629 So. 2d at 938.

There is simply no public policy reason to allow a person to be able to adversely possess his neighbor's land simply by mowing the yard or planting a flower bed. Certainly, if one mows a strip of his neighbor's lawn while mowing his own for aesthetic purposes, he should not receive title to that strip of land simply because his neighbor never complains about the free lawn care he is receiving.

The Setons' argument that a common thread in the law is that those who do not complain lose rights, see (Petitioners' Brief, at 15-16), pales in comparison to the much more relevant and common strain in Florida law regarding the sanctity of one's ownership of real property.

Indeed, as the Justice Boyd observed in his dissent in Seddon -- a position ultimately accepted by the Legislature -- "[p]resently real estate in Florida is extremely valuable as an investment regardless of its present use. There are many landowners who, though they may not be using their land, have no

intention of abandoning it." Seddon, 403 So. 2d at 413 (Boyd, J., dissenting). He further concluded that to allow a property owner to adversely possess land without evidence of that possession on file in the public record -- in the form of either paper title or the payment of taxes -- would be unconstitutional under both the Florida and Federal constitutions. Id. 413-14.

The Setons bemoan that these views are contrary to the common law of Medieval Europe, and this is true. But, as noted above, see supra Point (I)(A), the common law of adverse possession has been displaced in Florida (at least with respect to the notice necessary to the owner that his land is being possessed), in favor of a system that is more conducive to modern-day notions of property ownership.

Again, Justice Boyd observed that, when the United States adopted the English common-law version of adverse possession, "the courts adopted a public policy that as much land should be put to use as possible." Seddon, 403 So. 2d at 413 (Boyd, J., dissenting). But, "[o]ur society today has radically changed from our society of a hundred years ago. We have become so urbanized that the trend is toward adopting a public policy of preserving land in its natural state[, and] [i]t is now much more common for persons to own land without actually possessing it." Id.

A different, but equally significant, reality of modern-day property ownership is real property ownership in platted subdivisions. Unlike the properties at issue in Seddon, or even Bailey, the property at issue in this case -- and the property in

many areas of Florida -- is platted. The true boundaries of platted property is easily ascertainable, and thus there is no principled reason to allow property owners to gain title to property by the mere cultivation of their neighbors' land.

Indeed, this Court recognized, over forty years ago, that a major difference exists between platted property and nonplatted property in determining how that property should be treated in the context of a case involving boundary by acquiescence. See Shaw, 50 So. 2d at 128. In rejecting a claim that boundary by acquiescence had been created by the planting of a bamboo hedge, the Court observed that the doctrine had little value in cases involving platted property:

> The court house was only four blocks away. There[,] a plat of the city and the lands in question was available and if there had been a dispute as to the boundary between the parties data could have been easily secured and survey or measurements made to locate the true boundary. It was very different from being isolated where lines are uncertain, lands are of debatable value and surveys are difficult to make. The land in question were in the heart of the city and every means for locating the exact boundary were easily accessible.

Id.

The district court's decision is grounded in sound public policy and should not be overturned.

CONCLUSION

For the foregoing reasons, this Court should approve of the district court's decision in all respects.

Respectfully submitted,

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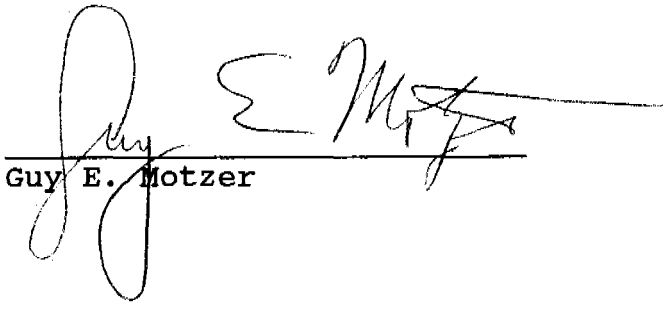

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